CASE NO. 02-17-00188-CR

IN THE COURT OF APPEALS
FOR THE SECOND DISTRICT OF TEXAS
AT FORT WORTH

CHARLES BARTON
Appellant

VS.

STATE OF TEXAS
Appellee

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

On appeal from case no.: 1314404
County Criminal Court 8 of Tarrant County, Texas

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TO THE HONORABLE JUSTICES OF SAID COURT:

Appellant, CHARLES BARTON, submits his brief as follows:

STATEMENT OF THE CASE

On November 19, 2012, Applicant was arrested in Grapevine, Texas for harassment. On February 11, 2013, Applicant was charged with nine counts of harassment under Texas Penal Code Section 42.07(a)(7).

On August 8, 2016, Applicant filed a motion to quash the information arguing the Texas Penal Code Section 42.07(a)(7)

harassment statute was unconstitutional. Tarrant County CCC8 denied Applicant's motion. On April 12, 2017, the Original Application for Writ of Habeas Corpus was filed. CCC8 denied the Writ, however, Appellant was granted leave of the court to appeal these issues. RR IV-10.

Applicant posted bond and is not currently incarcerated but must comply with the regulations of bond conditions.

ISSUE PRESENTED FOR REVIEW

WHETHER OR NOT CHARLES BARTON IS BEING ILLEGALLY DETAINED OF HIS LIBERTY DUE TO BOND RESTRICTIONS AND COURT APPEARANCES BASED UPON AN UNCONSTITUTIONAL STATUTE UPON THE REJECTION OF HIS MOTION TO QUASH AND WRIT OF HABEAS CORPUS

STATEMENT OF FACTS

On February 11, 2013, Applicant was charged with nine counts of harassment under Texas Penal Code Section 42.07(a)(7) specifically that Charles Barton on nine separate dates, "... did then and there intentionally, in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend Mona Dawson, send repeated electronic communications, to-wit: text message or email communications to Mona Dawson."

The defendant timely appealed.

SUMMARY OF THE ARGUMENT

POINT ONE

Vagueness _ The statute making it an offense to send electronic communications that "annoy" or "alarm" are unconstitutionally vague and susceptible to uncertainties of meaning whether applied to the general public or as it is being applied to Charles Barton. Additionally, the statute lacks a clear standard of conduct it specifies and is dependent on each complainant's sensitivity.

POINT TWO

First Amendment _ The statute additionally chills the protected Free Speech granted under the First Amendment of the U.S. Constitution and the Texas State Constitution.

POINT THREE

Fair Notice in Pleading _ The complaint lacks the specificity regarding whether in fact it was a text or an email that was prohibited by statute by Charles Barton. The complaint fails to inform the defendant and his counsel, which term of the statute i.e. annoy, alarm, abuse, etc. is being applied to Charles Barton's communication.

ARGUMENT

POINT ONE

ISSUE _ Sec. 42.07(a)7 is unconstitutionally vague as applied to everyone throughout the state as well as specifically as applied to Charles Barton's case. This statute makes it an offense to send electronic communications that "annoy" or "alarm" remains unconstitutionally vague and susceptible to uncertainties of meaning. Additionally, the statute lacks a clear standard of conduct it specifies and is dependent on each complainant's sensitivity.

RULE _ Sec. 42.07(a)7 states, "A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person: sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another."

A criminal conviction violates the due process clause of the Fifth Amendment, applied to the states through the Fourteenth Amendment, if it does not, "provide an person of ordinary intelligence fair notice of what is prohibited, or it is so standardless that it authorizes or encourages seriously discriminatory enforcement," United States v. Williams, 553 U.S. 285, 304 (2008); see Ex parte Bradshaw, 501 S.W. 3d

665, 667 (Tex. App.—Dallas 2016, pet. Ref'd). A statue is unconstitutionally vague when persons of common intelligence must guess what it means and disagree about its application. Ex parte Bradshaw, 501 S.W.3d at 677.

At a local level this court held, "that the portions of the harassment statute making it an offense to send electronic communications that annoy or alarm are unconstitutionally vague. Additionally, because the statute still does not establish a clear standard for whose sensibilities must be offended it is unconstitutionally vague in that the standard of conduct it specifies is dependent on each complainant's sensitivity." *Karenev v. State* 258 S.W. 3d 217 (Tex. App.—Fort Worth 2008).

This court added, "Because we hold that section 42.07(a)7 is unconstitutionally vague, we also hold that it is void." *Id. at 218.* The Texas Court of Criminal Appeals overturned Karenev simply on a procedural error in that Karenev raised the issues for the first time upon appeal. *Karenev v. State* 281 S.W.3d 428 (Tex. Crim.App 2009).

ANALYSIS _ As applied to everyone throughout the state, the term "annoy" means different things to reasonable people. Many people find musicians such as Brittney Spears, Weird Al Yankovic or Kanye West to

be "annoying" and yet all of these artists have legions of fans that have purchased millions of albums. In addition, any couple that has ever had a text fight that "annoyed" their significant other would be in violation of the statue as it currently stands. Surely, the legislature did not intend to criminalize an argument between husband and wife, yet every one of us has sent an "annoying" text to our significant other amid a disagreement.

Specifically, in Charles Barton's case, the defendant and his ex-wife shared a series of text and email communications throughout 2012. Business records indicate that the amount and frequency of texts from Mona Barton to Charles Barton far eclipsed the amount Mr. Barton sent to her. However, as applied to him, law enforcement deemed he was in violation of the statute, he was arrested and charged under the unconstitutionally vague statute. The statute as applied to Charles Barton gave him, an educated businessman of ordinary intelligence, no fair notice of what behavior was prohibited and no standard of whose sensibilities would be offended. These arguments were made on his behalf during the motion to quash. RR II-8-9.

Nowhere in the record of the original motion to quash did the state address the constitutionality of the statute whether on its face or

as it has been applied to Charles Barton. During the following, Writ of Habeas Corpus hearing for judicial efficiency sake the honorable judge Charles Vanover agreed to incorporate the prior record from the motion to quash hearing into the Habeas record for judicial efficiency so as to not make both parties re-argue the original points. RR IV-4. The crux of the state's argument regarding the statute was to merely re-read the statute's language and argue that it was clear without ever addressing the litany of possible interpretations to ordinary citizens or as it has been applied to Charles Barton. For example, the state argued, "And annoy is defined in the statue in that it's annoying to send repeated electronic communications." Page IV-6. If that's all it required under the statute then the alleged victim in Charles Barton's case should be arrested and charged as well considering business records indicate she sent repeated electronic communications at a higher rate and frequency than did Mr. Barton.

Today, Mr. Barton is raising the issue pre-trial in order to secure his right not to be tried on an unconstitutional statute that is both facially void and void as applied to him.

CONCLUSION _ In concluding point one, Section 42.07(a)7 is unconstitutionally vague and void as applied to any person charged

under the statute and specifically as applied to Charles Barton because it does not give clear notice of what behavior is prohibited by law, utilizes vague language and does not apprise Mr. Barton or the general public of whose sensibilities would be offended.

POINT TWO

ISSUE _ Section 42.07(a)7 chills First Amendment protected speech.

RULE _ The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech." This guarantee of free speech, which was made applicable to the various states by the Due Process Clause of the Fourteenth Amendment, *Gitlow v. New York,* 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138 (1925), generally protects the free communication and receipt of ideas, opinions, and information, *Red Lion Broadcasting Co. v. F.C.C.,* 395 U.S. 367, 390, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969); *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571-72, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). The Texas Constitution under Art. 1, Sec. 8 provides "Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press." In a nation of ordered liberty, however, the

guarantee of free speech cannot be absolute. The State may lawfully proscribe communicative conduct (i.e., the communication of ideas, opinions, and information) that invades the substantial privacy interests of another in an essentially intolerable manner. *Cohen v. California,* 403 U.S. 15, 21, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). In the context of First Amendment freedoms, a statute must be sufficiently definite so it does not chill free expression. *Long v. State,* 931 S.W.2d 285, 288 (Tex. Crim. App. 1996). The San Antonio Court of Appeals held in Lebo v. State, 474 S.W.3d 402 (2015) that 42.07(a)7 was not protected speech under the First Amendment.

ANALYSIS _ The guiding principal of the First Amendment remains that any statute meant to curtail free speech must be sufficiently definite. While the Texas Constitution provides the most stringent standard stating no law "shall ever be passed curtailing the liberty of speech."

Here, the state lacks any clear definite behavior by using terms that are widely subjective to interpretation. Additionally, 42.07(a)7 attempts to prohibit speech that law enforcement may arbitrarily determine to be annoying, which varies from person to person and from statement to statement and officer to officer.

The Court in Lebo failed to properly address section 42.07(a)7 in that it erroneously compared 42.07(a)4 (calling repeatedly on a land line and hanging up or not speaking once the phone was answered) to the actual text conveyed in an email or text message. *Id* at 407. The court, which carries no precedence in Tarrant County, stretched beyond comprehension to say that 42.07(a)4 behavior which has no "intent to engage in legitimate communication of idea, opinions or information" is the same as sending words, thoughts or ideas that are required for email or texts to exist at all. *Id.*

In relation to Charles Barton, The First Amendment protects speech between spouses and ex-spouses including Mr. Barton's ability to communicate with Mona Barton in that capacity. His texts certainly contained frustration with the behavior of Mona Barton but to say they were the same as calling and hanging up is outright ridiculous especially when plenty of texts occurred as a response to initial conversations by Mona Barton.

As applied to Charles Barton or any other person charged 42.07(a)7 prevents a spouse from expressing his true feelings, emotions or needs to his spouse for fear that his speech may be deemed "annoying" and therefore criminal.

CONCLUSION _ In concluding point two, Section 42.07(a)7 seeks to curtail free speech in the state of Texas by arbitrarily setting a standard that curbs speech not that is patently offensive or threatening but simply annoying. This is an overly broad reach that denies Charles Barton or any other Texan their fundamental First Amendment rights.

POINT THREE

ISSUE _ The charging instrument in this case lacks the specificity in apprising Charles Barton and his counsel, what communications are determined to violate the statute and in what manner under the laundry list of offenses the violation occurred and is therefore an invalid charging instrument.

RULE _

> Both the U.S. Constitution and the Texas Constitution guarantee an accused the right 'to be informed of the nature and cause of the accusation' against him. The charging instrument must convey sufficient notice to allow the accused to prepare a defense. The Legislature has provided some guidance as to the adequacy of notice through Chapter 21 of the Code of Criminal Procedure. In particular, Art. 21.03 provides that '[e]verything should be stated in an indictment which is necessary to be proved.' An indictment is generally sufficient to provide notice if it follows the statutory language. But tracking the language of the statute may be insufficient if the statutory language is not completely descriptive, so that more particularity is required to provide notice. For example, when a statute defines the manner or means of commission in several alternative ways, an indictment will fail for lack of specificity if it neglects to identify which of the statutory

means it addresses. *Curry v. State,* 30 SW 3d 394 (TexCr.App.2000).

Additionally, "where an indictment contains a necessary allegation of an act by the defendant which comprises more than one statutorily defined means of its performance, but the indictment fails to specify which of the statutory definitions of the act is relied upon, the indictment fails to provide the constitutionally required notice." *Gibbons v. State,* 652 S.W.2d 413 (Tex.Cr.App.1983).

ANALYSIS _ The charging instrument in Charles Barton's case simply parrots the language of the statute. In some offenses such as a simple drug possession charge this would provide plenty of notice as to the alleged offense.

However, 42.07(a)7 is not a simple straightforward matter of care, custody or control.

As *Curry* points out, some statutes require a more complete degree of care and information in a charging instrument. 42.07(a)7 requires proof of a subjective standard of interpretation as to the meanings of the terms "annoy" or "alarm" as well as the subjective notion of "intent." Therefore, it requires a greater level of detail, attention and effort from the state to clearly apprise Mr. Barton or

anyone else charged by the state of the manner and means in which they allegedly violated the statute.

The allegation of an act by Charles Barton comprises more than one statutorily defined means of its performance in that it could be either text or email. In charging Charles Barton the state has failed to specify both the means of the communication (text or email on days when dozens or more electronic communications were sent from both parties) and the manner in which Charles Barton violated the statute such as were the emails "annoying" or "alarming". The lack of specific, definite offenses against Charles Barton prevents him and his counsel from preparing a defense on his behalf in clear violation of the constitution and established case law.

CONCLUSION _ In concluding point three, the state's failure to clearly specify the manner and means in which Charles Barton allegedly violated the statute fail to provide the constitutionally required notice.

CONCLUSION

The Writ of Habeas Corpus regarding Charles Barton should be granted due to the vagueness of the Texas Harassment Statute, the unconstitutionality of the statute and because of the fatal flaws in the charging document in Charles Barton's case.

PRAYER

For the reason alleged herein, Appellant asks the court to grant his Writ of Habeas Corpus.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above foregoing Brief of Appellant was delivered or caused to be delivered to:

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On this the 9th day of March, 2018.

/S/ Tobias Xavier Lopez
Tobias Xavier Lopez

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